Limitations as a bar.[9] This view is based on the real object of the Statute and those cases seem indefensible, which deny this defense to foreign corporations doing business within the State, where a statute provides for service upon the agent. But in New York the early statute of personal service[10] was construed to give the court merely jurisdiction *in rem,* over corporate property within the State.[11] Upon this premise the decisions depriving these corporations of the right to plead the Statute are sound.[12]

In the recent case of *Hale* v. *St. Louis & S. F. Ry.* (Okla. 1913) 134 Pac. 949, the statute provided that service upon the agent gave personal jurisdiction over the foreign corporation, nevertheless the court held that defendant could not plead the Statute of Limitations. This result was reached upon the non-compliance by the corporation with the law of the State providing for domestication of foreign corporations. This is ordinarily no valid ground for denying the corporation the benefit of the Statute of Limitations, in absence of an express provision making compliance with such requirements a condition precedent to obtaining personal jurisdiction.[13] But the law of Oklahoma is very strict in forbidding recalcitrant corporations from doing business within the State.[14] And although this may be said to constitute an implied condition precedent to the legal existence of the defendant in the State, the opinion seems to be justifiable only on the policy of the State to protect its citizens from irresponsible foreign corporations.

PRIVILEGED COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT.—The early common law considered the rule of the exclusion of confidential communications made by client to his attorney as a privilege belonging only to the attorney, and extended this privilege only to those communications made in reference to pending suits. It followed, of course, that only the attorney could waive or raise the privilege.[1] But by the modern cases it is universally recognized that the true

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[9]Huss *v.* Central R. R. & Banking Co., *supra;* Pennsylvania Co. *v.* Sloan (1878) 1 Ill. App. 364; McCabe *v.* Illinois Central R. R. (U. S. D. C. 1882) 4 McCrary 492; *cf.* Mortgage Co. *v.* Butler (1910) 99 Miss. 56; City of St. Paul *v.* Chicago, M. & St. P. Ry., *supra.*

[10]Laws of New York (1855) ch. 279, p. 470.

[11]Hulbert *v.* Hope Mutual Ins. Co. (N. Y. 1850) 4 How. Pr. *275; Brewster *v.* Mich. Centr. R. R. (N. Y. 1850) 5 How. Pr. 183. See Tioga R. R. *v.* Blossburg & Corning R. R. (1873) 20 Wall. 137.

[12]Olcott *v.* Tioga R. R. (1859) 20 N. Y. 210; Rathbun *v.* Northern Central Ry. (1872) 50 N. Y. 656. These cases have overruled Faulkner *v.* D. & R. Canal Co. (N. Y. 1845) 1 Denio 441. The present statute, New York Code Civ. Proc. § 432, provides that the corporation shall designate an agent within the State to receive service of process. A foreign corporation complying with this provision may plead the Statute of Limitations. See Wehrenberg *v.* N. Y. N. H. & H. R. R. (N. Y. 1908) 124 App. Div. 205.

[13]Turcott *v.* Railroad, *supra;* See King *v.* National M. & E. Co. (1881) 4 Mont. 1; but see O'Brien *v.* Big Casino Gold Mining Co. (1908) 9 Cal. App. 283.

[14]Oklahoma Revised Laws (1910) §§ 1335 *et seq.*

[1]4 Wigmore, Evidence, § 2290.

rationale of the rule is subjective in its nature, *i. e.*, that the privilege exists for the benefit of the client and not for the attorney alone.[2]

Moreover, the rule, to-day, embraces all communications made for the purpose of seeking legal advice, irrespective of whether a suit is pending or not. But in order to bring a statement within this rule of exclusion, it must have been made in confidence by a client to his legal adviser, in his professional capacity. Certainly the privilege covers a case where the communication has been made by means of the client's agent, or of an interpreter, or by the client to the attorney's clerk.[3] The New Jersey Court of Errors and Appeals upheld this doctrine in the case of *State* v. *Loponio* (N. J. 1913) 88 Atl. 1045. Here, one R., a fellow-prisoner, had at the dictation of the accused written a letter to an attorney for the purpose of securing his services on the trial. The letter fell into the hands of a public detective. It was held that the objection by the accused to R.'s competence to testify as to the contents of the letter was valid. But as the court points out, it does not follow that the letter itself was inadmissible, for this falls within a limitation in the application of the rule; that, when a third party by any means overhears a confidential communication from a client to his attorney, he may testify thereto because he does not come within the privileged relationship. The reason for the inhibition also disappears when the client manifests no desire for secrecy; so if the attorney is consulted in the presence of third parties, the latter can be compelled to divulge their knowledge of the conversation.[4] In these instances, it is argued that the client has not met the requirement that his communication be in confidence: that the client must preserve secrecy at his peril.

It has been held that a "legal adviser" must in fact be an attorney or his clerk; but since the rule aims to free the client from any apprehension that his conversation will be disclosed, it would seem that on principle the privilege should extend to every case where the client has a *bona fide* belief in the status of his legal adviser as an attorney, even though in fact the one to whom the communication is addressed is not a licensed attorney.[5] Not only must the one to whom the statement is made be a legal adviser, but he must be acting in a profes-

[2]To-day, then, only the client may raise or waive the privilege. This rule, although never repudiated, has been severely criticised. See Bentham's argument as set out in 4 Wigmore, Evidence § 2291.

[3]6 Columbia Law Rev. 191; Root *v.* Wright (1891) 84 N. Y. 72; see Alderman *v.* People (1857) 4 Mich. 414. In many States the rule has been embodied in the Code. Haywood *v.* State (1901) 114 Ga. 111; Denver Tramway Co. *v.* Owens (1894) 20 Colo. 107, 125.

[4]McLean *v.* Clark (1872) 47 Ga. 24, 69; People *v.* Buchanan (1895) 145 N. Y. 1; Cotton *v.* State (1888) 87 Ala. 75; *cf.* Southern Ry. *v.* White (1899) 108 Ga. 201; Hoy *v.* Morris (Mass. 1859) 13 Gray 519. Where the same attorney acts for both parties, however, their respective communications are merely privileged from disclosure at the instance of a third party. See Root *v.* Wright, *supra.* Kaut *v.* Kessler (1886) 114 Pa. 603, 609.

[5]6 Columbia Law Rev. 191; People *v.* Barker (1886) 60 Mich. 277, 297; but see Barnes *v.* Harris (Mass. 1851) 7 Cush. 576; Sample *v.* Frost (1859) 10 Ia. 266; Hawes *v.* State (1889) 88 Ala. 37, 68; *cf.* Coon *v.* Swan (1856) 30 Vt. 6. In State *v.* Russell (1892) 83 Wis. 330, a conviction of murder was set aside on the ground that the district attorney induced, by false pretenses, the accused to confess to one whom he believed to be his attorney.

sional capacity, that is, the relation of attorney and client must exist at the time of the consultation.[6] It is not necessary, however, that a fee be given or a retainer paid,[7] although either may very well be recognized as conclusive evidence that the relation existed. Similarly, the privilege is denied when the advice sought has reference to future wrongdoing,[8] or if the client consults with him merely as a friend or neighbor.[9] Furthermore the courts have emphatically refused to extend the protection of this beneficial privilege to cover cases where it is evident that the attorney would suffer injury by being compelled to keep his silence,[10] or where the client has no intention whatsoever of employing him but is merely seeking "free legal advice."[11]

[6]If the communication takes place either before the relation of attorney and client exists or after it has ended, the privilege is denied, see State *v.* Herbert (1901) 63 Kan. 516; Mandeville *v.* Guernsey (N. Y. 1862) 38 Barb. 225, although it would be protected if made during the preliminary negotiation leading to the establishment of that relationship. Thorp *v.* Goewey (1877) 85 Ill. 611.

[7]Peek *v.* Boone (1892) 90 Ga. 767; Bacon *v.* Frisbie (1880) 80 N. Y., 394.

[8]9 Columbia Law Rev. 739.

[9]Goltra *v.* Wolcott (1852) 14 Ill. 89; Ewers *v.* White's Estate (1897) 114 Mich. 266.

[10]See State *v.* Madigan (1896) 66 Minn. 10; Keck *v.* Bode (1902) 23 Oh. C. C. 413; In Nave *v.* Baird (1859) 12 Ind. 318, the client sued the attorney for mismanagement of his cause, it was held that the attorney of necessity had to disclose confidential communications in order to vindicate his conduct.

[11]*In re* Monroe's Will (1890) 20 N. Y. Supp. 82; Brown *v.* Matthews (1887) 79 Ga. 1.